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No. 80-2132

In the Supreme Court of the United States

OCTOBER TERM, 1980

JAMES VERNER, et al.,
Co-Petitioner,

vs.

BUTCHERS' UNION #127,
Respondent.

SAFEWAY STORES, INCORPORATED,
Co-Petitioner,

vs.

BUTCHERS' UNION #127,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief of Respondent Butchers' Union Local #127 in Opposition to Petition

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QUESTIONS PRESENTED

1. Did the Union breach its duty of fair representation in pursuing a grievance that was based on the plain meaning of a seniority provision in a collective bargaining agreement?

2. Is an employer entitled to have a court set aside an arbitration award simply because one or more employees have filed a suit against the Union only for alleged breach of the duty of fair representation?

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Respondent Butchers Union #127[1] (hereinafter the "Union") opposes the joint petition for writ of certiorari heretofore filed by Safeway Stores, Incorporated (here-

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1. Except as set forth in footnote 1 of the Petition, all parties are named in the caption.

after the "Company") and by James Verner, who seek a writ to review a judgment of the United States Court of Appeals for the Ninth Circuit in Case No. 79-4388 and Case No. 79-4389. Contrary to the Petition, Pet. p. 2, the judgment of the Ninth Circuit affirmed two (2) decisions of the United States District Court for the Eastern District of California, one of which held that the Union had not breached its duty of fair representation in the handling of a grievance and the other confirmed an arbitration award in favor of the Union.

OPINIONS BELOW

The opinion of the Court of Appeals is not, at this time, reported and appears at Appendix A to the Petition. No petition for rehearing was filed in the Court of Appeals.

As to the action brought by the Company, the Memorandum and Order of the United States District Court for the Eastern District of California is not, at this time, reported and appears at Appendix B to the Petition.

The joint Petition, however, does not attach the Memorandum and Order of the same District Court as to the action brought by James Verner, as required by Rule 21.1(k). It too is unreported at this time, and a copy appears at Appendix A to this Brief in Opposition, infra, pp. A-1 to A-9.

JURISDICTION

The Memorandum Opinion of the Court of Appeals was filed on March 17, 1981. The Petition for Writ of Certiorari was received by Respondent on June 16, 1981. Jurisdiction in this Court is claimed by Petitioners under 28 U.S.C. § 1254(1). Jurisdiction in the trial court lay under § 301 of the Labor-Management Relations Act, as amended, 29 U.S.C. § 185.

STATUTORY PROVISIONS INVOLVED

§ 301(a), Labor-Management Relations Act, as amended, 29 U.S.C. § 185(a):

> "Sec. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organization, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

COUNTERSTATEMENT OF THE CASE

The Petitioner Company has a meat processing plant in Stockton, California. The plant is set up in various "departments" according to functions performed. These departments are recognized in the collective bargaining agreement which provides that seniority can be established on the basis of Plant Seniority, Department Seniority and Classification Seniority.

On March 25, 1977, the Company ceased operating its Boning Department wherein carcass beef had been boned. It began to import already boned meat. As a result of the closing of the Boning Department, 17 employees, some with long years of employment with the Company, were laid off. These employees did not "bump" some other employees with less seniority into layoff status.

Gradually, on various dates in May and June, 1977, most of the 17 laid off boners were brought back by Safeway and transferred into vacancies in other departments at the Company. The Company established the department seniority for these employees not on the basis of their dates of first employment with the Company but only as of the dates they went to work in these other departments in May and June, 1977.

Then, on or about September 17, 1977, Safeway went through yet another layoff, and these former boners, because of their relatively new seniority in the other departments, were among those first laid off.

The Union then filed a grievance with the Company based primarily on a certain provision in the collective bargaining agreement. Section "G" of the provision on Department Seniority provided:

> "G. In the event of the *closing* of any of the above departments, Employees transferred to another department will immediately establish their department seniority *based upon their plant seniority.*" (Emphasis added)

In the opinion of the Union there was a genuine question of whether (i) the Boning Department had been "closed" within the meaning of Section G and (ii) the employees who were transferred into vacancies in other departments should have had their department seniority established only from the day they were so transferred, or "based upon their plant seniority", i.e. from the day they were first employed. The plain language of "G" seemed to suggest to the Union the latter.

The grievance was put before Arbitrator David Karasick on January 27, 1978, and the hearing was completed on July 7, 1978. Mr. Karasick, a highly respected labor arbitrator, was chosen by the Union and the Company pursuant to the grievance and arbitration provisions of the collective bargaining agreement. That provision, in typical language, mandates the parties to resolve by arbitration any dispute as to the "interpretation" of the agreement. The arbitrator is similarly empowered to interpret the agreement.

At the arbitration, oral and documentary evidence was taken. The Union recognized that if it were successful, the

arbitration would result in the rearranging of the relative seniority status of at least some employees. The experienced arbitrator also recognized this truism of seniority cases. He had before him as an exhibit the very seniority list itself, showing the relative standing of the employees. The Company argued, inter alia, that the Boning Department had not been "closed". It also argued that the Union had withdrawn from collective bargaining a provision, entitled "Right to Displace", because the members had not wanted a "bumping" provision. The Company argued that what the Union sought in the arbitration was a form of bumping. The Union responded to all the arguments. It admitted that the "Right to Displace" proposal had been withdrawn; but that Section G *was* in the agreement, did not directly involve bumping but was limited to those transferring into vacancies, and was aimed at a narrow and peculiar set of circumstances where an entire department was closed and many veteran employees transferred to other departments.

The Arbitrator's Award issued on September 20, 1978. The Arbitrator ruled in favor of the Union, finding that the Boning Department had been "closed" within the meaning of Section G and that the former Boning Department employees had been entitled upon transferring into vacancies in other departments to have their seniority in those departments fixed "based upon their plant seniority". Indeed the Arbitrator found Section G "to be clear and unambiguous and therefore would require no parole evidence to explain its meaning".

After the Award issued, the Company set about complying with the Award by recalculating the relative seniority and reinstating those previously laid off. The Company then chose to lay off other employees. The Petitioner, Mr.

Verner, was among those then laid off. At this point Mr. Verner tried to get the Union to process a grievance going in the opposite direction and against what the Arbitrator had just found to be the clear and unambiguous language of the agreement. Mr. Verner, it is said, then issued a threat to the Company that it should not follow the Award, and the Company immediately obliged and ceased complying with the Award and henceforward supported Mr. Verner's litigation.

The Verner Action:

The action by Mr. Verner was begun by a "Complaint to Vacate Arbitration Award and to Compel Tripartite Arbitration" filed December 18, 1978, and attached to which was a copy of the collective bargaining agreement and a copy of the Award of the Arbitrator.

A first claim sought to vacate the Award, alleging that Mr. Verner and others were denied the opportunity to participate in the arbitration and that he and others had sought aid and assistance from the Union to no avail. The second claim sought to compel what is labelled as "tripartite arbitration" so that Mr. Verner and unnamed others could participate as a third party in new arbitration proceedings.

On January 15, 1979, the Union filed a Motion to Strike Doe Defendants, to Dismiss, or Alternatively, for Summary Judgment. The motion was accompanied by an affidavit to which were attached (i) the entire reporter's transcripts of the arbitration; (ii) all the Union and Company exhibits at the arbitration; (iii) the Union's brief to the Arbitrator; and (iv) the brief of the Company to the Arbitrator. Essentially, the motion thus laid the entire arbitration process before the Court and challenged Mr. Verner to come forward with "significant probative evi-

dence tending to support the complaint". *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288-90, 88 S. Ct. 1575 (1968). Petitioner Verner filed an opposition including an affidavit of Mr. Verner.

On March 12, 1979, the District Court made its Order granting the Union's motion for summary judgment. Thereafter, Petitioner Verner filed a Motion for Reconsideration, and after additional briefing the District Court on May 16, 1979, issued its written Memorandum and Order (infra, App. A, A-1 to A-9).

The Safeway Action:

On the day after the filing of the action by Mr. Verner, the Company filed a "Complaint to Vacate Labor Arbitrator's Award". The action was formally related to the action of Mr. Verner by an order of the District Court. The Union answered, and it counterclaimed, seeking confirmation of the Award and an order directing the Company to complete the arbitral process insofar as the Company was obligated to pay substantial backpay. Cross motions for summary judgment were filed by the Company and the Union. The Union initially challenged the standing of the Company to raise the issue of fair representation. The Company denied it was trying to allege that the Union breached that duty and insisted it was only trying to avoid conflicting liabilities. The Company opposed the Union's demand to complete the arbitral process on the alleged basis that the jurisdiction of the Arbitrator had expired. The District Court denied the Company's motion and granted the motion of the Union on its counterclaim. Judgment was entered on March 21, 1979.

Thereafter, on April 2, 1979, the Company also filed a Motion for Reconsideration. After further briefing the District Court made its Memorandum and Order denying reconsideration (Pet., App. B, B-1 to B-8).

Both the Company and Mr. Verner appealed. After briefing, the Ninth Circuit entered an order consolidating both appeals for purposes of argument and disposition. On March 17, 1981, the Ninth Circuit filed its Memorandum Opinion affirming both decisions of the District Court in favor of the Union.

ARGUMENT

Petitioners urge this Court to grant the Petition because the decision of the Court of Appeals produces "an unfair and undesirable result", Pet., p. 8, and is allegedly in conflict with a decision of another court of appeals, *Ibid.*. The former is not a stated basis under Rule 17 for granting a petition. Further, the decision below is not in conflict with the decision of another circuit and raises no new and important issue requiring consideration by this Court. Indeed, the decision below is squarely within the mainstream of prior decisions of this Court and the Petition represents nothing more than an assault on those principles.

A. The Verner Group Presents No Conflict Among the Circuits Or Other Accepted Reason For Granting the Writ.

In *Hines v. Anchor Motor Freight,* 424 U.S. 554, 96 S.Ct. 1048 (1976), this Court held that an employer can enjoy the finality of an arbitration award in its favor unless and until a complaining grievant can show that the grievant's union breached its duty of fair representation and that this breach contributed in some way to an erroneous arbitration award.

The District Court, and the Court of Appeals, correctly found that Verner failed to prove a breach of the duty of fair representation. A breach of that duty occurs when the union's conduct towards its member is "arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes,* 386 U.S. 171, 190, 87 S.Ct. 903 (1967). Petitioner Verner neither pleaded

nor produced any evidence to show such a breach. Specifically, Petitioner Verner could not come forward with one argument or even one piece of evidence that had not already been made and put in evidence in the course of the arbitration proceedings. The Arbitrator ultimately found that the Union's position on the grievance was supported by the plain meaning of § G of the collective bargaining agreement. The Court of Appeals was thus correct in holding that the Union did not breach its duty of fair representation when it simply championed the plain meaning of the collective bargaining agreement; nor did the Union breach that duty when it refused subsequently to prosecute for Mr. Verner a grievance going in the diametrically opposite direction. If the Court of Appeals misapprehended the factual record, no petition for rehearing was filed to attempt a correction.

In this Court in its Petition Verner continues to complain that he had no opportunity to contribute toward formulation of the Union's position in arbitration, received no notice of the arbitration, and received no opportunity to offer testimony or evidence (Pet. p. 20). Again, Verner fails totally to say what he would have contributed or what testimony or evidence he would have had to give.

Despite even now having no specific evidence or argument to show why the award was wrong, Verner claims there is a requirement of advance notice to other groups of employees whose seniority interests might be affected by a pending arbitration (Pet. p. 20). Verner claims there is a conflict in the circuits and cites the Eighth Circuit's en banc decision in *Smith v. Hussmann Refrigerator Co.*, 619 F.2d 1229 (1979). *Smith* simply does not support Verner. Verner first fails to call the Court's attention to the subsequent clarification order of the Eighth Circuit, issued after a

petition for rehearing on its en banc decision, wherein the majority held the evidence in fact failed to show a breach of the duty of fair representation by the Union advocating the promotion of more senior employees. 619 F.2d 1253. To the extent *Smith* talked of the need for notice at all, it was only as a product of a much more fact-sensitive analysis of possible prejudice from a lack of notice, and even *Smith* recognized that in seniority disputes the union may take a position in favor of one group on the basis of an informed, reasoned judgment regarding the merits of the claims in terms of the language of the collective bargaining agreement. 619 F.2d at 1237. The Union did just that in this instance where it supported nothing more than the plain meaning of § G of the agreement.

The complete satisfaction of all who are represented by a union is hardly to be expected, and a union in serving all whom it represents is entitled to a wide range of reasonableness, subject to good faith and honesty of purpose. *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338, 73 S.Ct. 681 (1953). Mr. Verner did not support his dissatisfaction with any such showing of bad faith or dishonesty of purpose.

B. Safeway Neither Asserts a Conflict Among the Circuits Nor Otherwise Presents a Reason For Granting the Writ.

Safeway sought below to vacate the Arbitrator's Award. There was no question, however, that the Award drew "its essence" from the collective bargaining agreement and had to be confirmed, as the Union's counterclaim requested. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S.Ct. 1358 (1960). Safeway's Petition for a Writ of Certiorari does not contest this fundamental principle for the judicial review of arbitration awards.

Safeway wanted to set aside the Award simply because the Verner group filed a suit against the Union for breach

of the duty of fair representation. Because of the pendency of the Verner suit, Safeway says, the Award did not resolve the labor dispute in a final and binding manner. That argument, as the District Court and Court of Appeals properly perceived, is directly contrary to this Court's teaching in *Hines v. Anchor Motor Freight, supra*. It is only *after* the breach of the duty of fair representation has been established that the bar of finality attaching to an arbitration award is lifted. It is to be noted that Petitioner Safeway does not even cite this Court to *Hines* in its Petition; and, its Petition is in fact structured to ignore the teaching of *Hines*. Presumably, if Safeway had *won* the arbitration and was now faced with a suit by the 17 employees the Union had represented, it would be more than happy to rely on *Hines*.

In this Court, Safeway continues to claim that it faces unnamed causes of action from the Verner group. Pet. p. 12. The Court of Appeals correctly rejected this same opportunism and held that since no breach of the duty of fair representation occurred, the bar of finality protected Safeway from suit by Verner. So too, since the Arbitrator's award did finally resolve the issue put to him, there is no need for this Court to assay what differences, if any, the U.S. Arbitration Act would have on *Hines*. There is an open question as to that Act's applicability to collective bargaining agreements. This case does not present the need to resolve that issue.

Finally, Petitioners would have this Court decide whether an undescribed procedure "comparable" to tripartite arbitration is an appropriate remedy, Pet. pp. 17-19. Since no remedy beyond denial of the Petition is required, this is not the case to examine such a novel idea which is solely a product of a line of a few cases from the Second Circuit limited to the resolution of jurisdictional disputes.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Executed at San Francisco, California, this 8th day of July, 1981.

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Appendix follows

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Civil S-78-669-PCW

(Related with Civil No. S-78-670-PCW)

JAMES H. VERNER, et al.,
Plaintiff,

vs.

BUTCHERS' UNION No. 127, et al.,
Defendant.

[Filed May 16, 1979]

MEMORANDUM AND ORDER

Plaintiff James Verner has moved for reconsideration of this court's order granting summary judgment to defendant Butchers' Union Local No. 127. Based on the following discussion and reasoning, the court declines to relieve plaintiff from the judgment and hereby confirms its earlier order.

The judgment was entered on March 13, 1979. Plaintiff Verner's instant motion was filed on April 4, 1979, after the ten day period allowed by Rule 59(e) of the Federal Rules of Civil Procedure. The court is not permitted to extend the time within which to file a Rule 59(e) motion. Rule 6(b) of the Federal Rules of Civil Procedure.

On April 13, 1979, plaintiff Verner noticed an appeal of the judgment to the Ninth Circuit Court of Appeals. During the pendency of an appeal, the district court may consider a motion brought pursuant to Rule 60(b) and may deny said motion although the district court cannot, until there has been a remand, grant the motion. *See Canadian Ingersoll-Rand Co. v. Peterson Products of San Mateo*, 350 F.2d 18 (9th Cir. 1965).

Plaintiff apparently seeks relief from the judgment under Rule 60(b)(6); i.e., relief for a reason not listed in Rule 60(b)(1)-(5). The motion to reconsider is based on a recent Eighth Circuit decision, *Smith v. Hussmann Refrigerator Co,.* ..... F.2d ....., 100 LRRM 2238 (8th Cir. 1979).

Background

The facts of this action are fairly straightforward. Safeway Stores, Incorporated (hereinafter Safeway) and the Butchers' Union Local No. 127 of the Amalgamated Meat Cutters and Butcher Workmen of North America (hereinafter Local 127) are parties to a written collective bargaining agreement effective October 1, 1976 through October 1, 1979.

On March 25, 1977, Safeway stopped boning carcass beef at its Stockton meat processing plant, apparently on the basis that it could more cheaply bring in meat already boned elsewhere. Seventeen of the eighteen employees of the Boning Department were laid off. Some of these individuals had had many years of employment with Safeway.

In May and June of 1977, most of these employees were called back and placed in available vacancies in other departments, primarily the Sausage Processing Department and the Sausage Packing Department. These employees were assigned seniority dates in the departments determined by the dates of their employment starts in the new departments rather than by the dates of their first employment at Safeway; i.e., plant seniority.

In September of 1977, certain layoffs were required in the Sausage Processing and Sausage Packing Departments. These layoffs were effectuated in accord with the department seniority (as determined by the dates of their employment starts in those departments) of the employees. The

layoffs thus fell most heavily upon those employees newly transferred from the Stockton boning department.

Local 127 then filed a grievance against the manner in which the "Boning Seventeen" employees had been assigned departmental seniority in their new departments. The union contended that the Boning Department was closed within the meaning of ¶ G of the Departmental Seniority provisions of the Collective Bargaining Agreement. This subsection provides:

> In the event of the closing of any of the above departments, employees transferred to another department will immediately establish their department seniority based upon their plant seniority.[1]

Furthermore, the union took the position that ¶ D of the Departmental Seniority Provisions of the Collective Bargaining Agreement merely states that department seniority applies in the case of a layoff but that it does not govern how such seniority is established in the event that a transfer occurs because a department is closed. Paragraph D provides:

> Department seniority shall prevail at all times in matters concerning promotions, if qualified, layoffs, rehiring, vacations, shift preference, job bidding and overtime.[2]

Safeway, on the other hand, argued that the department seniority should be determined by the date of the employment start in the department rather than the date of the employment start at Safeway.

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1. Collective Bargaining Agreement between Safeway Stores, Incorporated and the Butchers' Union, Local No. 127 of the Amalgamated Meat Cutters & Butcher Workmen of North America (signed March 4, 1977), Article X, Departmental Seniority at 18, ¶ G.

2. *Id*, ¶ D.

In order to resolve the issue of whether the date of the department employment start or the date of the plant employment start should govern in this situation, Safeway and Local 127 submitted the dispute to an arbitrator. Arbitration hearings were held on January 27, 1978 and on July 7, 1978, pursuant to the grievance and arbitration procedure for the resolution of "any dispute that may arise as to the interpretation"[3] of the collective bargaining agreement.

As a result of the arbitration proceeding, the arbitrator found that the one employee who had not been laid off from the Boning Department was in fact working on the loading dock and that the Boning Department was "closed" within the meaning and intent of ¶ G of the Departmental Seniority Provisions of the Collective Bargaining Agreement. The arbitrator further stated ¶ G was clear and unambiguous and that no parol evidence was required.

In September, 1978 the arbitrator rendered his opinion and award directing that the "Boning Seventeen" employees be granted seniority in their new departments dating from the time each became a permanent employee at Safeway. The arbitrator further directed reinstatement, as well as back pay, for those entitled to such reinstatement as a result of the newly computed departmental seniority dates.

Plaintiff James H. Verner is one of the fifty-three employees who would be bumped lower on the seniority ladder within their departments as a result of the arbitrator's award.

On December 18, 1978, plaintiff Verner filed the instant action seeking to vacate the arbitration award and to compel

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3. Collective Bargaining Agreement, *supra*, Article XI, Grievance and Arbitration at 22.

tripartite arbitration between Safeway, his group of employees and the boning employees. Jurisdiction of the suit was claimed on the basis of § 301 of the Labor Management Relations Act of 1947, (29 U.S.C. § 185). Plaintiff alleges that he was not afforded an opportunity to participate in the proceeding before the arbitrator and was not fairly represented by the union.

Defendant Local 127 subsequently moved to strike the Doe defendants and to dismiss, or in the alternative, for summary judgment. These motions were heard at the court's March 12, 1979 Law and Motion Calendar.

Discussion

Jurisdiction—Courts do not have jurisdiction under § 301 of the Labor Management Relations Act over an action alleging a union's breach of the duty of fair representation unless there is an allegation that there was a breach of the labor contract. *Mumford v. Glover,* 503 F.2d 878, 882 (5th Cir. 1974). There is no such allegation here.

If there is no alleged breach of a collective bargaining agreement involved, federal jurisdiction may, however, be asserted, in duty of fair representation cases against a union, under 28 U.S.C. § 1337, which grants federal courts power to hear all cases arising under congressional acts regulating commerce. *Smith v. Local 25, Sheetmetal Workers International Association,* 500 F.2d 741 (5th Cir. 1974). The National Labor Relations Act is such an act. *Capital Service v. NLRB,* 347 U.S. 501, 504 (1954). Therefore, jurisdiction over this action is proper.

Class Action—At one point, the instant complaint refers to "a class of employees adversely affected and without representation."[4] An action cannot be deemed a class action

4. Complaint at 8, l. 18-19.

unless shown to be such by the complaint. *United States v. Preston*, 352 F.2d 352, 356 (9th Cir. 1965). Rule 124 of the Local Rules of Practice for the Eastern District of California sets forth the special requirements for filing a class action complaint. Since these requirements were not met here, the action was not treated as a class action.

Doe Defendants—There is no provision in the Federal Statutes nor in the Federal Rules of Civil Procedure for the use of fictitious parties. *See Craig v. United States*, 413 F.2d 854 (9th Cir. 1969). The proper method of adding new parties in the federal courts is found in Rule 15 of the Federal Rules of Civil Procedure. The motion to dismiss the Doe defendants was therefore granted.

Duty of Fair Representation—The duty of fair representation is a statutory duty implied from the grant to the union by section 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a), of exclusive power to represent all employees of the collective bargaining unit. *Vaca v. Sipes*, 386 U.S. 171, 177 (1967). As the exclusive bargaining representative, the union must represent fairly employees both in its collective bargaining and in its enforcement of the resulting collective bargaining agreement. *Vaca, supra* at 176. A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith. *Vaca, supra* at 190.

Pursuant to *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976), the arbitration award may be set aside, if the union breached its duty of fair representation.

The union here points out that it disclosed to the arbitrator that the grievance, if successful, would advance the seniority status of some employees ahead of that of others. The union also contends that the interpretation sought by

the union may eventually assist the "Verner" employees if their Department is closed and they are transferred to vacancies in other departments. Furthermore, the union points out that there is nothing in the record to show any arguments which could have been made on behalf of the complaining employees which were not made on their behalf.

In *Humphrey v. Moore*, 375 U.S. 335 (1964), the Supreme Court stated:

> [W]e are not ready to find a breach of the collective bargaining agent's duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents nor in supporting the position of one group of employees against that of another. In *Ford Motor Co. v. Huffman*, 345 U.S. 330, 73 S.Ct. 681, 97 L.Ed. 1048 (1953), the Court found no breach of duty by the union in agreeing to an amendment of an existing collective bargaining contract, granting enhanced seniority to a particular group of employees and resulting in layoffs which otherwise would not have occurred. 'Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. . . .' [citation omitted]. Just as a union must be free to sift out wholly frivolous grievances which would only clog the grievance process, so it must be free to take a position on the not so frivolous disputes. Nor should it be neutralized when the issue is chiefly between two sets of employees. Conflict between employees represented by the same union is a recurring fact. To remove or gag the union in these cases would surely weaken the collective bargaining and grievance processes." *Humphrey v. Moore, supra* at 349.

There is nothing to show discrimination or hostility in the decision of the union in the instant case to process the grievances of the "Boning Seventeen" nor in the representation of the union during the arbitration proceedings. The arbitrator determined that the agreement in regard to employees from the closed departments was clear and unambiguous and that no parol evidence was needed to determine the meaning of ¶ G.

For these reasons, then, the Court granted summary judgment to defendant Local 127.

The case cited by plaintiff in support of his motion to reconsider, *Smith v. Hussmann Refrigerator Co.*, ... F.2d ...., 100 LRRM 2238 (8th Cir. 1979), does not justify the relief requested. That case involved the weighing of facts, i.e., the skill and ability of various employees, some of whom were not present at the arbitration proceeding. The instant matter was simply one of contract interpretation.

In fact, the court in *Smith* noted that processing the grievance of some employees regarding their seniority status necessarily derogates the seniority of other employees. In that situation, the court stated that "the union must fairly represent both groups of employees and may take a position in favor of one group only on the basis of an informed reasoned judgment as to the merits of the claims in terms of the language of the collective bargaining agreement (citations omitted)." *Smith, supra* at .....

As far as this record shows, the union in the instant action took its position honestly, in good faith and without hostility or arbitrary discrimination in the processing of the grievances of the "Boning Seventeen". Indeed, since the arbitrator indicated that ¶ G was clear and unambiguous, no parol evidence was allowed. There was therefore no breach of the union's duty of fair representation.

Furthermore, there has been no showing that the arbitration award was erroneous.

IT IS THEREFORE ORDERED that this Court's Order, entered on March 13, 1979, be and the same is, hereby confirmed.

DATED: May 15, 1979

PHILIP C. WILKINS
UNITED STATES
DISTRICT JUDGE